No. 21-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY LLC,

Defendant Below, Petitioner

vs.

DEBORAH L. JARRETT, as the Executrix of the Estate of Kevin M. Jarrett,

Plaintiff Below, Respondent.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-217

BRIEF OF PETITIONER SPEEDWAY LLC

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ASSIGNMENTS OF ERROR

I. The Circuit Court erred in denying Speedway's Motions for Judgment as a Matter of Law at trial under Rule 50(a) and post-trial under Rule 50(b) because under established West Virginia law, Speedway was under no legal duty to control the conduct of its employee, Brandy Liggett, after she left work on the day of the motor vehicle accident which is the subject of this lawsuit.

II. The Circuit Court erred in granting Respondent's Rule 60(b) Motion to Alter or Amend the Verdict by Way of Additur and Rule 59 Motion for a New Trial on Unliquidated Damages because under established West Virginia law, the damages awarded to Respondent were not so low as to require relief from the jury's verdict.

III. The Circuit Court erred in denying Speedway's Alternative Motion for a New Trial under Rule 59 due to the presence of multiple prejudicial errors at both trials.

IV. The Circuit Court erred in denying Speedway's Alternate Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order because the Order incorrectly assesses post-judgment interest.

STATEMENT OF THE CASE

Who is responsible when an adult voluntarily and surreptitiously obtains and takes illegal prescription medication, chooses to operate a vehicle, falls asleep at the wheel due to the medication, and strikes and kills a motorcyclist? Longstanding West Virginia law and common-sense dictates that the adult who made these terrible, lifechanging decisions is responsible. However, in this potential watershed case for all West Virginia employers and business owners, Respondent and the Circuit Court have placed responsibility at the feet of the adult's three-day employer—an employer that didn't provide the medication, know about the medication, or force the adult to drive her vehicle after she clocked out for the day.

The Circuit Court's rulings throughout the duration of this case created brand new liability for West Virginia employers directly contrary to the recognized boundaries created by this Court in *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983) and *Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990). These rulings, if allowed to stand, will set West Virginia apart from the rest of the nation. They will impose a previously unrecognized duty on all

employers in West Virginia to ensure that any employee leaving work is fit to drive a motor vehicle for an indefinite period of time after work—no matter why or when the employee may have become unfit to drive—and even to actively prevent the employees from leaving the workplace on their own accord. That could include, as was argued by Respondent at trial, holding the employee against his or her will, forced drug testing, forced searching of the employee's body and vehicles, notifying the police, and other Draconian measures.

This appeal arises from a wrongful death action as a result of a motor vehicle accident caused when Brandy Liggett took illegal prescription medications and drove a motor vehicle, striking and killing the decedent, Kevin M. Jarrett. On the date of the accident, Ms. Liggett was employed by Petitioner Speedway LLC ("Speedway") but was not acting as an agent or employee of Speedway at the time of the accident. To the contrary, Ms. Liggett was driving her own personal car on a personal errand almost forty-five minutes after she left work at Speedway, where she had been employed for approximately three days. The accident happened more than seven miles from her place of employment and after she had made an intervening personal stop at the local middle school. Because of her actions, Ms. Liggett pleaded guilty to the commission of several crimes and accepted responsibility for the death of Mr. Jarrett. Despite all of this, the Circuit Court repeatedly denied Speedway's efforts to obtain rulings consistent with West Virginia law, including denials of Speedway's Motion for Summary Judgment and Motions for Judgment as a Matter of Law.

I. Factual Background

The accident giving rise to this lawsuit occurred on Ms. Liggett's third day working for Speedway. On September 15, 2015, Ms. Liggett arrived at the Glen Dale Speedway store at 6:00 a.m. for a shift that was scheduled to end at 2:00 p.m. (JA 2614, 2655.) When she arrived at the

store, she appeared to be okay. During the shift, the manager of the Glen Dale Speedway, Bobbi Jo Maguire, noticed Ms. Liggett nodding off twice while Ms. Liggett was watching training videos and once when Ms. Liggett was taking out the trash by the fuel pumps. After seeing Ms. Liggett nodding off, Ms. Maguire asked her if she was okay. (JA 2620–21, 2622, 2624.) Each time, Ms. Liggett assured Ms. Maguire she was simply tired from staying up late and worrying about things at home. (*Id.*) There was no indication that anything else was wrong, and no employee of Speedway ever observed Ms. Liggett take any medication—that day or ever.

At some point during the day when another employee called off work, Ms. Maguire asked Ms. Liggett if she could work an additional hour, and Ms. Liggett agreed to stay until 3:00 p.m. (JA 2635.) During that extra hour of work, no problems were reported with Ms. Liggett or her behavior. When Ms. Liggett finished her shift at 3:00 p.m., she drove two miles to Moundsville Middle School to take football equipment to her son. Ms. Liggett left the middle school on her own accord, as she had from work, and began to drive home. Five miles away from the middle school, at approximately 3:42 p.m., Ms. Liggett lost control of her vehicle, crossed the center line, striking Mr. Jarrett on his motorcycle and killing him. (JA 2158–59; JA 2163–64; JA 2152.)

Following the accident, Ms. Liggett tested positive for amphetamine, benzodiazepine, and buprenorphine, although the amounts in her system are not known. (JA 2379.) Ms. Liggett admitted to having the medications in her system although she did not have a prescription for them and admitted that this caused the accident. (JA 2079–88.) She pleaded guilty to several crimes—including driving under the influence resulting in death—for her actions that day. (*Id.*) According to Ms. Liggett, no one knew she abused prescription medication. Although she claims she was "high all of the time" (JA 2468), Ms. Liggett hid her prescription drug use from everyone,

including her mother and grandmother, whose car she was driving that day. (JA 2495–97.)[1] While she does not remember the accident Ms. Liggett took "full responsibility" for the death of Mr. Jarrett. (JA 3149.)

II. Procedural Background

On December 12, 2015, Respondent Deborah L. Jarrett, as the Executrix of the Estate of Kevin M. Jarrett, filed suit against Ms. Liggett and her grandmother, Carol Howard, in the Circuit Court of Marshall County for the wrongful death of Mr. Jarrett. Almost a year later, she amended her complaint to add Speedway as a defendant, alleging that Speedway had a duty to control the conduct of Ms. Liggett. (JA 15–26.) Following the close of discovery, Speedway moved for summary judgment because, under well-established West Virginia law Speedway had no duty to control the conduct of Ms. Liggett, who was not on duty, not an agent, and not engaging in any business for Speedway at the time of the accident and where Speedway engaged in no affirmative conduct to cause Ms. Liggett's incapacity or to cause Ms. Liggett to create an unreasonable risk of harm to others. (JA 357; JA 359–370.) The Circuit Court denied that motion. (JA 1526–34.)

A. At trial, Respondent fails to establish that Speedway owed any duty to control Ms. Liggett's off-duty conduct, and the Circuit Court erroneously denies Speedway's Motion for Judgment as a Matter of Law.

The case proceeded to trial in July 2019, and Speedway timely moved for judgment as a matter of law under W.Va. R. Civ. P. 50(a) because Respondent had failed to establish that Speedway owed any duty to control Ms. Liggett's off-duty conduct. (JA 2946–52; JA 3082–81.) The Circuit Court denied both Rule 50(a) motions, in doing so making up patently false evidence about Speedway employees "tee-heeing" in the back room. (JA 2964–70; JA 3198; JA 2968.)

[1] In fact, she was even, in her own words, "high" on the same illegal medication the day she pleaded guilty to crimes related to the accident and waived her right to a trial – in front of the same judge who presided over the civil trial in this matter. Even he apparently did not even know she was under the influence, despite "being high" on the same medication that impacted her ability to drive on September 15, 2015. (*See* JA 2492–93.)

Also, during trial, and pertinent to the Circuit Court's decision to grant Respondent's motion for additur, Respondent introduced expert testimony from Daniel J. Selby, an economist, by which Mr. Selby offered an opinion as to the economic damages allegedly suffered by Mr. Jarrett's beneficiaries. Mr. Selby used a summary chart to offer his opinions, but Respondent's counsel chose not to admit this chart into evidence. (*See* JA 3202.)

After the Circuit Court prevented Speedway's corporate representative from testifying on behalf of the company at trial, the defense rested, the jury was charged, and closing statements were made. During the charge, over Speedway's objections, the Circuit Court defined the standard for negligence under West Virginia law by instructing the jury that liability "for a wrong done by negligence is founded upon an original moral duty upon every person or company to conduct themselves so as to not injure another." (JA 3268.) The Circuit Court further instructed the jury that if it found that Speedway "violated any of its own rules or policies," the jury may "consider such violation or violations as evidence of the standard of care and whether Speedway breached its standard." (JA 3269.) During closing arguments, Respondent's counsel argued to the jury that it was "clear cut" that Speedway was negligent because "[Speedway] violated the standard of care. They didn't follow their [internal] policies" which, according to Respondent, "could be used to demonstrate what those standards are[.]" (JA 3147–48.)

During deliberations, the jury asked the Circuit Court: "Requesting Mr. Selby's projective earnings and lost wages. (found W2s but can't find these)." (JA 3256.) The Circuit Court told the jury it would have to rely on its own memory in assessing damages. (JA 3202.) Following four hours of deliberations, the jury returned the following unanimous verdict:

> 1. Do you find that Speedway LLC was negligent and that such negligent was a cause or contributing cause of the injuries to and death of Kevin Jarrett?

Yes X No _____

2. What percentage of fault do you assign to Speedway LLC and Brandy Liggett for the injuries and death of Kevin Jarrett?

Speedway LLC	30 %
Brandy Liggett	70 %
	100% total

3. What amount of damages do you assess for physical and mental pain and suffering of Kevin Jarrett before his death?

$ 50,000

4. What amount of damages do you assess for:

Medical Bills	$ 8,321.36
Funeral Bills	$ 16,422.02
Lost Wages to July 22, 2019	$ 306,660
Lost Earning Capacity (Future)	$ 262,000

5. What total amount of damages do you assess to fully compensate all the beneficiaries of the Estate of Kevin Jarrett . . .for:

(a) The sorrow, mental anguish and solace, including loss of society, loss of companionship, loss of comfort, loss of guidance, loss of kindly offices and loss of advice of Kevin Jarrett:

$ 80,000

(b) The loss of services, protection, care and assistance provided by Kevin Jarrett:

$ 100,000

6. Do you find that Defendant Speedway, LLC's actions were done with a conscious, reckless and outrageous indifference to the health, safety and welfare of Kevin Jarrett or others?

Yes _____ No X

(JA 3288–89.) Thus, the jury determined the total damages resulting from the death of Mr. Jarrett to be $823,403.38, which included past lost wages of $306,660, lost earning capacity damages of

$262,000, lost household services of $100,000, and sorrow and mental anguish damages of $80,000. On August 8, 2019, after accounting for interest, court costs, and jury fees, the Circuit Court entered a Final Judgment Order against Speedway in the amount of $268,204.50. (JA 3290–92.)

B. The Circuit Court erroneously denies Speedway's renewed Motion for Judgment as a Matter of Law and erroneously grants Respondent's Motion to Alter or Amend the Verdict by Way of Additur and Motion for a New Trial on Unliquidated Damages.

After entry of the Final Judgment Order, Speedway filed a renewed Motion for Judgment as a Matter of Law under Rule 50(b), as Speedway had no duty under West Virginia law to control the actions of Ms. Liggett while she was not working for Speedway. (JA 3343–44; JA 3345–55.) At the same time, Respondent moved for additur under Rule 60(b) and for a partial new trial under Rule 59. (JA 3294–3312.) Respondent's post-trial motions sought to disturb the $823,403.38 damages verdict of the jury due to the alleged inadequacy of the award. *See id.*

By Order dated November 18, 2019, the Circuit Court denied Speedway's renewed Rule 50 Motion for Judgment as a Matter of Law and granted Respondent's Rule 60(b) Motion to Alter or Amend in the Verdict by Way of Additur. (JA 3485–3489.)[2] In so doing, the Circuit Court struck the jury's finding of $306,660 in past lost wages and reformed the verdict by additur to reflect a finding of $477,708 for past lost wages. (JA 3485–3486.) By the same Order, the Circuit Court also granted Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages of "solace damages" and household services, again rejecting the jury's unanimous verdict and award

[2] At the hearing on this matter, the Circuit Court initially indicated that it was going to take Respondent's post-trial motions under consideration. However, after inquiring of Speedway as to whether an appeal was likely and receiving an affirmative response, the Circuit Court immediately reversed course and granted Respondent's motions, indicating off the record that "you might as well take the whole case up."

on these elements of damages. (JA 3488–3489.) The Circuit Court's Order left in place in the jury's finding as to the apportionment of fault and other elements of damages.[3]

C. The case proceeds to a second trial on limited issues of damages, during which the Circuit Court commits multiple prejudicial errors over Speedway's objections.

On March 3, 2020, the case proceeded to a second trial on the limited issues of solace damages and household services set aside by the Circuit Court. Prior to jury selection, the Court took up Respondent's motion in limine to "prohibit[] any attempt by defendant to elicit evidence or testimony that is unrelated to the damages issue," and Speedway's request that the Circuit Court advise the jury of the results of the first trial and the damages which were assessed and affirmed by the Court. The Circuit Court granted Respondent's motion and ruled that the parties would not be allowed to mention "any figures that were decided by the prior jury." (JA 3784.) Additionally, the Circuit Court prohibited any references by counsel to the "other categories of [wrongful death] damages" not at issue in the second trial, including "the availability of them, the actionability of them, them at all." (JA 3785–86.) Ultimately, the Circuit Court prohibited any references whatsoever to the first trial. (JA 3786.)

During the pretrial conference, the Circuit Court also overruled Speedway's objection to Respondent's expert testimony about the valuation of household services. (JA 3793–94.) Consistent with its ruling that the parties would not be permitted to make any reference to the first jury trial, the results of that trial, or the existence of other categories of wrongful damages, the

[3] On December 13, 2019, Speedway filed a timely Notice of Appeal from the Circuit Court's November 18, 2019 post-trial order. (JA 3491–3515.) Respondent thereafter moved to dismiss the appeal arguing that the order under review was not "a final judgment from which an appeal can be taken." (JA 3516–3586.) Speedway opposed the motion to dismiss, arguing that the Circuit Court's order granting a new trial was an appealable order, and therefore, this Court had jurisdiction over the appeal. (JA 3587–3644.) On February 20, 2020, this Court granted Respondent's motion to dismiss. (JA 3545–3646.)

Circuit Court also declined to give the following portion of Speedway's proposed Jury Instruction No. 2, which explained that the first jury had previously awarded certain categories of damages to Mr. Jarrett's beneficiaries:

> This Court previously held a trial in this lawsuit and certain facts were determined of which you should be aware. First, a jury determined that both Brandy Liggett and Speedway are legally responsible for the accident. The jury found Ms. Liggett to be 70% responsible and Speedway to be 30% responsible.
>
> . . .
>
> A jury also awarded certain categories of damages to Mr. Jarrett's family as a result of this death. Specifically, a jury awarded damages for medical bills and funeral bills incurred. A jury also determined the amount of damages that will be awarded for the lost income of Mr. Jarrett, both before the trial and into the future. Finally, a jury already determined the amount of compensation that will be awarded to his family for the pain and suffering of Mr. Jarrett after the accident and before he death. As a result, in this trial you will not be asked to assess any sum to be awarded to Mr. Jarrett's family for medical bills, funeral bills, his pain and suffering, or his past or future wage loss.

(JA 3688–89.)

During her case-in-chief, Respondent introduced the testimony of her expert witness, Mr. Selby, who offered an opinion as to lost household services allegedly suffered by the beneficiaries as a result of the death of Mr. Jarrett was $362,323.00. (JA 3937–38, 3939.) Thereafter, during closing arguments, Respondent's counsel electronically displayed a demonstrative aid to the jury (JA 4048), which was represented to the Circuit Court to be a visual representation of Respondent's counsel's arguments as to the damages to be awarded under W. Va. Code § 55-7-6(c)(1) for the beneficiaries of Mr. Jarrett. (JA 4019.) Speedway's counsel objected to the use of the demonstrative aid as confusing and misleading as to the damages to be awarded, and the Court overruled the objection. (JA 4018–20.)

Further, counsel for Respondent improperly suggested during closing arguments that it was the duty of the jury to place a value on Mr. Jarrett's life, stating, "*There's not one person that can put a specific dollar on a person's life*; the value. That's – why even talk about it? It's crazy. You

can't do it, but our judicial system says that *you have that obligation*, and you take an oath to do it, as difficult as it may be[.]" (JA 4023 (emphasis added).) Respondent's counsel also included in his argument the following statements regarding the amount of damages to be awarded:

> At the end of the day, . . . [y]ou're going to come up with numbers and all that. Some of you may feel that six million dollars is too much. Say, "Wow, six million. Just too much." . . . And some of you may say eight million is not enough.

(JA 4027–28.) Counsel for Speedway objected to these statements as improper under West Virginia law, and the Circuit Court overruled the objections. (JA 4028–29.) Counsel for Respondent then continued with his argument to the jury, stating "So let me say it again," and repeating "Some of you may feel that six million dollars is too much. Others may feel that eight million is not enough." (JA 4030.) Following deliberations, the jury returned a verdict on the limited damages tried of $5,862,323. (JA 4049.)

On August 5, 2020, the Circuit Court entered Respondent's proposed judgment order, including a post-judgment interest provision to which Speedway had objected,[4] as the second Final Judgment Order in this case. (JA 4050–53.)

D. The Circuit Court denies Speedway's renewed Motion for Judgment as a Matter of Law, Alternate Motion for a New Trial, and Alternate Motion to Alter or Amend the Court's August 5, 2020 Judgment Order.

Thereafter, Speedway timely renewed its Motion for Judgment as a Matter of Law under Rule 50(b) based on the arguments and authorities set forth in its prior Motion for Summary Judgment and Motions for Judgment as a Matter of Law, all of which Speedway explicitly incorporated by reference. (JA 4054–57; JA 4058–77.) In the alternative, Speedway moved the Circuit Court for a new trial on all issues under Rule 59 due to multiple prejudicial errors at both

[4] On March 16, 2020, counsel for Speedway received Respondent's proposed final judgment order. Because the parties were unable to agree on a provision pertaining to post-judgment interest, Respondent submitted her proposed order to the Circuit Court "as a disputed order." (JA 4190–94.) Speedway timely submitted its objections to Respondent's proposed order and submitted a separate proposed order. (JA 4195–97; JA 4201–04.)

trials, or to alter or amend the Final Judgment Order entered on August 5, 2020 under Rule 59(e) to correct the award of post-judgment interest. (JA 4171–75.) By Order dated February 26, 2021, the Circuit Court denied Speedway's post-trial motions. (JA 4531–41.)

SUMMARY OF ARGUMENT

I. The Circuit Court erred in ruling, directly contrary to well established precedent from this Court, that Speedway was under a legal duty to control the conduct of its employee, Brandy Liggett, while she was not working, was not within the scope of her employment, and was driving her own vehicle.

Generally, "under traditional principles of master-servant law an employer is normally under no duty to control the conduct of an employee acting outside the scope of [her] employment." *Robertson v. LeMaster,* 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). This Court created a limited exception to this general rule in *Robertson v. LeMaster* where an employer forced its employee to work for twenty-seven (27) hours straight over his objection, suggested that the employee could be fired if he left work, gave him a ride to his car in a clearly exhausted state, and told him to drive home. This Court held an employer "who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has *created* an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Id.*, Syl. Pt. 2, 171 W. Va. 607, 301 S.E.2d 563 (emphasis added).

In this case, to the contrary, the trial record is utterly devoid of evidence that Speedway engaged in affirmative conduct that created a risk of harm to others. No evidence was presented at trial to show that Ms. Liggett's work at Speedway on September 15, 2015, caused her impairment. Every bit of the evidence in this case definitively showed that Ms. Liggett lost control of her vehicle and hit Mr. Jarrett due to ingesting various illegal prescription medications at some point in time before the accident. These medications were obtained by Ms. Liggett illegally from the street and voluntarily consumed by Ms. Liggett without any involvement by or knowledge of

her three-day employer, Speedway. Even if Speedway had been aware of Ms. Liggett's illegal use of prescription medications, which it was not, a duty of care would still not exist under West Virginia law unless Speedway actually engaged in affirmative conduct that created an unreasonable risk of harm to others. *See Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990).

Looking at the evidence in the light most favorable to Respondent, all Respondent could possibly have shown was that Ms. Maguire *should have known* that Ms. Liggett was under the influence of *something* when she was nodding off at work. Under West Virginia law, this is insufficient to establish that Speedway owed a legal duty to control Ms. Liggett's off-duty conduct and thus the Circuit Court erred in denying Speedway's Motion for Summary Judgment and Motions for Judgment as a Matter of Law.

II. Alternatively, the Court should reverse the Circuit Court's erroneous decision granting Respondent's post-trial motions seeking relief from the jury verdict in the form of additur under Rule 60(b) and for a partial new trial under Rule 59, because the damages awarded were not so low as to require relief from the jury's verdict.

In granting Respondent's post-trial motions, the Circuit Court imposed its own belief as to what were appropriate damages in the place of the jury's, infringed on Speedway's constitutional right to a jury trial, and did so in direct contravention to West Virginia law. The Circuit Court erred in granting Respondent's Rule 60(b) Motion to Alter or Amend the Verdict by Way of Additur because this case does not fall within the narrow set of circumstances where additur is permitted under West Virginia law. The facts of the case do not demonstrate that the jury made an error in its award of damages, or that the jury intended to award more damages. *See Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 621, 461 S.E.2d 124, 127 (1995); *Bostic v. Mallard Coach Co., Inc.*, 185 W. Va. 294, 295, 406 S.E.2d 725, 726 (1991).

Likewise, by again replacing its own predilections for the jury's, the Circuit Court erred in granting Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages. The jury's $180,000 award of "solace damages" and household services damages was a result of four hours of deliberations and a unanimous agreement between six competent individuals. It certainly was not "manifestly inadequate" under West Virginia law as the jury provided a damages award for all forms of damages established at trial and awarded an amount it believed appropriate. *See Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993).

Therefore, if this Court does not reverse the denial of Speedway's Motions for Judgment as a Matter of Law and enter judgment in Speedway's favor, it should nonetheless reverse the Circuit Court's erroneous decision granting additur on certain damages and a new trial on others.

III. Alternatively, the Court should reverse the Circuit Court's erroneous decision denying Speedway's Alternate Motion for a New Trial under Rule 59, due to the presence of multiple prejudicial errors at both trials.

Where a "verdict is against the clear weight of the evidence, is based on false evidence or *will result in a miscarriage of justice*, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial." Syl. Pt. 3, in part, *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994) (emphasis added). A party is entitled to a new trial "if there is a reasonable probability that the jury's verdict was affected or influenced by trial error." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 111, 459 S.E.2d 374, 388 (1995). Granting a new trial is particularly appropriate in cases of cumulative errors, such as the present case. Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379.

IV. Alternatively, the Court should reverse the Circuit Court's erroneous decision denying Speedway's Alternate Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order under Rule 59(e).

Finally, in denying Speedway's post-trial motion alter or amend the August 5, 2020 Final Judgment Order, the Circuit Court failed to correct a clear error of law and to prevent manifest

injustice to Speedway based on its erroneous award of post-judgment interest. The Final Judgment Order erroneously 1) assesses post-judgment interest beginning on the date the jury returned its verdict, rather than the date the judgment order was entered, 2) fails to take into account the prior judgment order entered following the first trial in this case, and 3) assesses post-judgment interest on certain elements of damages set forth in that order, despite the fact that the order was not final.

Therefore, if this Court does not enter judgment in Speedway's favor, it should nonetheless reverse the Circuit Court's denial of Speedway's Motion to Alter or Amend the August 5, 2020 Final Judgment Order and remand with instructions to correct the award of post-judgment interest.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because of the extraordinary expansion of employer liability imposed by the Circuit Court's rulings, the importance of this case suggests that oral argument would be appropriate. Under the Rule of Appellate Procedure Rule 18(a), this case is appropriate for oral argument pursuant to Rule 19(a) as it involves assignments of error involving the application of settled law and the unsustainable exercise of discretion where the law governing the discretion is well-settled. Further, in light of the Circuit Court's improper and significant expansion of the duty of employers well beyond established West Virginia law, this case is not appropriate for disposition by memorandum decision.

ARGUMENT

I. The Circuit Court erred in denying Speedway's Motion for Judgment as a Matter of Law at trial under Rule 50(a) and post-trial under Rule 50(b) because under established West Virginia law, Speedway was under no legal duty to control the conduct of its employee, Brandy Liggett, after she left work on the day of the accident.

The first step in any analysis of civil tort liability is to determine whether a duty existed. In West Virginia, "[i]n order to establish a *prima facie* case of negligence . . . it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the

plaintiff." Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.,* 167 W. Va. 866, 280 S.E.2d 703 (1981). This Court recognizes that, generally, "under traditional principles of master-servant law an employer is normally under no duty to control the conduct of an employee acting outside the scope of [her] employment." *Robertson v. LeMaster,* 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). It is undisputed that at the time of the accident, Ms. Liggett was "off the clock" and was acting outside the scope of her employment. Therefore, Speedway generally would not owe any duty to control Ms. Liggett's off-duty conduct.

An exception to the general rule provides that an employer "who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has *created* an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." Syl. Pt. 2, *Robertson,* 171 W. Va. at 608, 301 S.E.2d at 564 (emphasis added). Here, even viewing the evidence in the light most favorable to Respondent, there was no evidence at trial of any affirmative conduct by Speedway that would give rise to a duty of care under *Robertson.*

First, Speedway did not engage in any affirmative conduct creating an unreasonable risk of harm to others. Second, under West Virginia law, even if the evidence showed that anyone at Speedway was aware Ms. Liggett was under the influence on the day of the accident (which it did not), Speedway still had no duty to control her conduct once she left work. Finally, a duty did not arise by Speedway "allowing" Ms. Liggett to leave Speedway property on the date of the accident. Speedway had no legal duty to prevent Ms. Liggett from leaving her place of work unless it had engaged in some affirmative conduct causing her incapacity, which it did not.

A. Standard of review.

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure . . . is *de novo.*" Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

"When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) . . . its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Id.* at Syl. Pt. 2. Therefore, "when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." *Id.*

B. Speedway did not engage in any affirmative conduct imposing a duty to control Ms. Liggett's conduct outside the scope of her employment.

Affirmative conduct giving rise to a legal duty involves actually engaging in some willful action that increases the risk of harm to others. *See Robertson,* 171 W. Va. at 611, 301 S.E.2d at 567 (employer required employee to work for 27 hours straight over his objection, suggested that the employee could be fired if he left work, gave him a ride to his car in a clearly exhausted state, and told him to drive home, which imposed a legal duty on the employer), and *Courtney v. Courtney*, 186 W. Va. 597, 599, 413 S.E.2d 418, 420 (1991) (mother provided drugs and alcohol to her adult son, which gave rise to legal duty to control his conduct when mother knew son would become violent after using these substances). In this case, even viewed favorably to Respondent, Speedway's conduct is clearly unlike the conduct of the defendants in *Robertston* and *Courtney.*

In *Robertson,* an employee was required by his railroad employer to help clean up after a train derailment. 171 W. Va. at 608, 301 S.E.2d at 564. This required the employee to work well beyond his regularly scheduled shift, for a total of 27 consecutive hours. *Id.* at 609, 301 S.E.2d at 565. During this time, the employee repeatedly told the foreman he was exhausted and asked to be allowed to go home. However, his foreman would not allow him to leave and refused him food. *Id.* at 609, 301 S.E.2d at 565. When the employee was finally allowed to go home after being forced to work 27 hours straight, he was clearly exhausted and even fell asleep with a lit cigarette in his hand. *Id.* at 609, 301 S.E.2d at 565. Despite this, the employer drove the employee

to his car and told him to drive himself 50 miles home, rather than give him a ride home or provide a place to rest, as the employer did with other employees working the derailment. *Id.* at 609, 301 S.E.2d at 565. In determining the employer had a duty, this Court stated that "the [employer]'s conduct in requiring its employee to work such long hours and then setting him loose upon the highway in an obviously exhausted condition" could foreseeably create an unreasonable risk of harm to others that the employer had a duty to guard against. *Id.* at 612–13, 301 S.E.2d at 569.

Similarly, in *Courtney*, this Court held that a defendant mother engaged in affirmative conduct giving rise to a legal duty where she unlawfully supplied Valium and alcohol to her adult son. 186 W. Va. at 604, 413 S.E.2d at 425. The mother was aware of her son's violent tendencies while using those substances, and the son attacked his ex-wife and her child while under the influence of the drugs his mother provided him. The Court held that the mother had a duty to act reasonably by not giving her son drugs and alcohol, which she knew would cause him to become abusive. *Id.* at 604–05, 413 S.E.2d at 425–26.

Speedway's alleged conduct in this matter is strikingly different than the conduct of the defendants in *Robertson* or *Courtney*. Viewed in the light most favorable to Respondent, the evidence at trial established that Ms. Liggett was under the influence of a cocktail of illegal prescription medications on the day of the accident, and this impairment caused the accident resulting in the death of Mr. Jarrett. The evidence also established that Ms. Liggett affirmatively hid her abuse of prescription medications from Speedway, deliberately concealing her illicit ingestion of the medications. (JA 2495–96.) She also lied to Speedway employees in a further effort to prevent Speedway from discovering her illegal use of prescription medications. On three occasions, the manager of the Glen Dale Speedway, Ms. Maguire, asked if Ms. Liggett was okay. Each time Ms. Liggett said she was simply tired. (JA 2620–21, 2622, 2624.) When asked

if she needed to go home and come back another day, Ms. Liggett assured Ms. Maguire she could keep working and wanted to do so. (JA 2621–22.) Under these circumstances, Ms. Maguire allowed Ms. Liggett to keep working, which she did, without issue. At some point, Ms. Maguire asked if Ms. Liggett would work an extra hour, and Ms. Liggett agreed to stay until 3:00 p.m., when her original shift was scheduled to end at 2:00 p.m. (JA 2635.)

Ms. Maguire's conduct was entirely unlike the conduct of the employer in *Robertson.* The employer in *Robertston* engaged in affirmative conduct that *caused* the impairment at issue and therefore, created an unreasonable, foreseeable risk. Here, Ms. Liggett voluntarily worked a nine-hour shift as a convenience store cashier and voluntarily left when that shift was over. In fact, opposite to the situation in *Robertson* where the employee was asking to leave but could not, Ms. Maguire offered to let Ms. Liggett leave and come back a different day if she was too tired, but Ms. Liggett refused. This evidence is not the type to establish the affirmative conduct that creates an unreasonable risk of harm required to impose a duty under West Virginia law.

Moreover, no evidence was presented at trial to show that Ms. Liggett's work at Speedway in any way caused her impairment. Instead, every bit of evidence in this case definitively showed that Ms. Liggett lost control of her vehicle, crossed the center line, and hit Mr. Jarrett *due to her use of prescription medications*. Following the accident, Ms. Liggett tested positive for amphetamine, benzodiazepine, and buprenorphine. (JA 2379.) As a result, Ms. Liggett eventually pled guilty to several crimes, including driving under the influence causing death. (JA 2079–88.) No evidence at trial, in the form of expert testimony or otherwise, was presented that proved, or even suggested, that Ms. Liggett's accident was caused by Speedway that day, either in general or by asking her to work for one extra hour. In fact, there was no testimony *whatsoever* regarding any effect working at Speedway that day may have had on Ms. Liggett.

Ms. Liggett's own testimony and criminal plea agreement established that the accident happened because she took a combination of prescriptions medications at some unknown point in time. Unlike the mother in *Courtney*, Speedway certainly did not give Ms. Liggett the medication and was unaware that Ms. Liggett had any medication reliance, as Ms. Liggett hid her addiction from everyone. At trial, Ms. Liggett admitted that no one, including her own family, knew that she was abusing prescription medications. (JA 2495–97.) Ms. Liggett illegally obtained the medication from the street and voluntarily consumed it without any involvement by or knowledge of Speedway, her employer of only three days. (JA 2469; JA 2495.) Finally, Ms. Liggett testified that she felt fine to drive when she left Speedway and would have declined a ride had she been offered one. (JA 2495.) In short, all Respondent showed at trial was that Ms. Liggett's use of prescription medications was surreptitious and created an unreasonable risk of harm to others.

Respondent's theory at trial rested almost entirely on the fact Ms. Liggett was under the influence of prescription drugs while at work, and her arguments that Speedway was "responsible for the death of Mr. Jarrett" because it should have somehow investigated Ms. Liggett's condition by searching her or drug testing her and should have called a taxi or the police or done something else to stop her from driving away from the store that day. "Should have done something" is an argument that Speedway's conduct was the failure to act not the result of affirmative action taken. At bottom, Speedway's conduct in this case is not the affirmative conduct required to impose a legal duty to prevent Ms. Liggett from off-duty driving on the day of the accident, forty-five minutes after her shift ended and seven miles away from the store.

C. Even if Speedway was aware of Ms. Liggett's intoxication, which it was not, Speedway had no duty of care because Speedway did not cause her impairment or force her to drive home.

Under West Virginia law, even if an employer is aware of an employee's intoxication, it is under no duty to control that employee's off-duty conduct. *See Overbaugh v. McCutcheon,* 183 W.

Va. 386, 396 S.E.2d 153 (1990). In *Overbaugh*, an employer sponsored a party at which alcohol was available for employees to serve themselves. *Id.* at 387; 396 S.E.2d at 154. One of the employees drank to the point of visible intoxication, got into his car, and drove away. *Id.* at 388, 396 S.E.2d at 155. The employee was involved in an accident, and suit was brought against the employer. *Id.* This Court declined to impose liability under *Robertson,* or any other law, finding that even though the employer actually knew of the employee's intoxication and furnished the alcohol that was consumed by the employee, the employer was not liable for the injuries caused by the car accident. *Id.* at 392, 396 S.E.2d at 159. Under West Virginia law, simply knowing of an employee's intoxication (which Speedway did not) is inadequate to establish a legal duty.

In finding no liability could be imposed on the employer, this Court in *Overbaugh* recognized several factors which are analogous to the instant matter. First, this Court highlighted that the employer was unaware that the employee had a drinking problem or a history of such a problem. 183 W. Va. at 392, 396 S.E.2d 159. Second, the Court recognized that the employer did not instruct the employee to leave the party. *Id.* Finally, to the extent there was any affirmative conduct by the employer, it was an attempt to minimize the risk of harm to third parties. *Id.*

All these factors are found in the instant matter as well, and each further establishes that Speedway owed no duty here. First, like the employer in *Overbaugh* who did not know the employee had a drinking problem, Ms. Maguire was unaware that Ms. Liggett was abusing prescription drugs. In fact, Ms. Liggett testified that no one in her life knew that she was abusing prescription drugs—not Ms. Maguire or anyone at Speedway or even her grandmother, who lent Ms. Liggett the vehicle involved in the accident. (JA 2495–97.) Based on the evidence at trial, the only thing Ms. Maguire knew was that Ms. Liggett, an employee of only three days, was exhibiting symptoms consistent with being tired and told her she was tired when questioned.

Additionally, like *Overbaugh,* there was no evidence presented at trial that anyone at Speedway directed Ms. Liggett to leave or to drive while under the influence. Rather, Ms. Liggett finished her shift at the store and left of her own accord to run personal errands. At trial, Ms. Liggett testified that she knew people she could have called if she needed a ride but felt she was capable of driving. (JA 2495.) Ms. Liggett also testified that if anyone at Speedway had offered her a ride, she would have declined. (*See id.*) Therefore, like the employer in *Overbaugh,* Ms. Maguire never directed Ms. Liggett to leave or to drive home, and like the employee in *Overbaugh,* Ms. Liggett made the decision to drive on her own.

Furthermore, the evidence at trial indicated that Ms. Maguire took steps to minimize the risk to third parties. When Ms. Maguire observed Ms. Liggett nodding off, she talked to Ms. Liggett to try to find out why. (JA 2620.) On at least two occasions, Ms. Maguire asked Ms. Liggett if she was okay; each time, Ms. Liggett stated she was simply tired. (JA 2620–21; JA 2624.) Ms. Maguire asked Ms. Liggett if she wanted to come back another day, but Ms. Liggett assured Ms. Maguire that she could keep working. (JA 2621; JA 2622–23; JA 2624.) Therefore, like the employer in *Overbaugh,* to the extent that Ms. Maguire took any affirmative action related to Ms. Liggett, it was to ensure that Ms. Liggett was okay and did not need any assistance.

Finally, the facts in this case are even more favorable than in *Overbaugh.* First, no one from Speedway provided Ms. Liggett with the prescription medications she ingested on the day of the accident. In contrast, the employer in *Overbaugh* hosted a party and provided alcohol that employees could serve themselves. *Id.* at 154. Second, Ms. Maguire did not actually know that Ms. Liggett was under the influence on the date of the accident. Ms. Liggett testified that, to the extent she took any prescription medications during her shift at Speedway, she would have done

so in the bathroom where no one could witness it. (JA 2472.) In contrast, the employer in *Overbaugh* affirmatively knew that the employee was intoxicated and impaired.

Therefore, looking at the evidence in the light most favorable to Respondent, all Respondent could possibly have shown was that Ms. Maguire *should have known* that Ms. Liggett was under the influence of *something* when she was nodding off at work. This is insufficient to establish that Speedway owed a legal duty to control the off-duty conduct of Ms. Liggett.

II. The Circuit Court erred in granting Respondent's post-trial motions seeking relief from the jury verdict in the form of additur under Rule 60(b) and for a partial new trial under Rule 59, because the damages awarded to Respondent were not so low as to require relief from the jury's verdict.

When a court is reviewing the adequacy of a damage award, "the evidence concerning damages is to be viewed most strongly in favor of the defendant." *Kaiser v. Hensley*, 173 W. Va. 548, 548, 318 S.E.2d 598, 598 (1983). Further, "[i]n instances where the evidence does not indicate and the plaintiff does not aver that the jury was misled or motivated by passion, prejudice, partiality, or corruption, this Court will set aside an allegedly inadequate verdict in a wrongful death action only where the verdict is so low that under the facts of the case reasonable men cannot differ about its inadequacy." *Vargo v. Pine*, 208 W. Va. 416, 417, 541 S.E.2d 11, 12 (2000). In her post-trial motion, Respondent did not argue that the jury was "misled or motivated by passion, prejudice, partiality, or corruption." Instead, Respondent essentially argued that the amount of damages returned by the jury was too low, so the Circuit Court should upset the verdict of the jury. Respondent failed to establish, however, that the damages verdict was so low as to require relief.

A. In granting Respondent's post-trial motions, the Circuit Court disregarded constitutional protections and impermissibly invaded the province of the jury.

It is well-established that the West Virginia Constitution protects both the right to a jury trial in civil cases and the verdicts rendered by juries at such trials. Article III, Section 13 of the West Virginia Constitution provides that

> [i]n suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. *No fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law.*

W. Va. Const. art. III, § 13 (emphasis added). This Court has interpreted this section of the West Virginia Constitution as "expressly safeguard[ing] the verdict in addition to guaranteeing the right to a jury trial." *Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 621, 461 S.E.2d 124, 127 (1995). Further, "[l]ike a finding of liability, an award of damages, is a factual determination reserved for the jury." *Id.* at, 622, 461 S.E.2d at 128. As such, "the determination of not only the right to recovery but also of the amount of the recovery, where damages are unliquidated, is part of the jury trial guaranteed by [the Constitution]." *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 508, 345 S.E.2d 791, 808 (1986) (McHugh, J., dissenting).

This Court has held "[i]n an action for personal injuries, the damages are unliquidated and indeterminate in character, and the assessment of such damages is the peculiar and exclusive province of the jury." *Toler v. Hager*, 205 W. Va. 468, 471, 519 S.E.2d 166, 169 (1999). "In a case of indeterminate damages for which the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce belief that they were influenced by passion, partiality, corruption or prejudice or misled by some mistaken view of the case." *Id.* at 475, 519 S.E.2d at 173.

In this case, the jury heard all of the evidence, reviewed the exhibits as admitted into evidence, and came to a unanimous decision regarding the damages to be awarded in this matter. There is no evidence that the jury was influenced by passion, partiality, corruption, or prejudice, and no argument has ever been raised to that end. Further, there is no indication that the jury was "misled by some mistaken view of the case." Instead, Respondent asked the Circuit Court to invade the province of the jury simply because she believed the amount of damages was too low. Because Respondent failed to establish that such invasion is permissible under the law, the Circuit Court erred by disturbing the jury's verdict as to the amount of damages in the case.

B. The Circuit Court erred in granting Respondent's Rule 60(b) Motion to Alter or Amend the Verdict by Way of Additur because the jury did not make an error in its award of damages.

The Circuit Court erred in granting Respondent's Rule 60(b) Motion to Alter or Amend the Verdict by Way of Additur because this case does not fall within the narrow set of circumstances where additur is permitted under West Virginia law, as the facts do not demonstrate that the jury made an error in its award of damages or intended to award more damages.

1. Standard of review.

In West Virginia, "[r]arely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances." *Coffman v. W. Virginia Div. of Motor Vehicles*, 209 W. Va. 736, 740, 551 S.E.2d 658, 662 (2001). While recognizing that a motion to vacate a judgment under Rule 60(b) is "addressed to the sound discretion of the [trial] court," this Court will disturb the ruling on appeal when there is "a showing of an abuse of such discretion." Syl. Pt. 5, *Toler*, 157 W. Va. at 784, 204 S.E.2d at 89.

2. This case does not fall within the narrow set of circumstances where additur is permitted under West Virginia law.

"An award of additur is appropriate under West Virginia law only where the facts of the case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction in the jury's *intended* award." *Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 621, 461 S.E.2d 124, 127 (1995) (emphasis added); *see also* Syl. Pt. 3, *Bostic v. Mallard Coach Co., Inc.*, 185 W. Va. 294, 302, 406 S.E.2d 725, 733 (1991). More specifically, under West Virginia law, additur is appropriate only "[w]hen a jury returns a verdict that lacks a total definitive amount but specifies an amount for damages and payment of specific expenses and costs, and after being directed to give a definitive sum, renders a measurably lower verdict than their first effort by virtue of the jury's failure to understand the cost of an expert witness's fee." *Bostic*, 185 W. Va. at 295, 406 S.E.2d at 726.

Bostic provides a clear example of when a grant of additur is appropriate. In *Bostic*, the facts clearly demonstrated that the jury intended to render a verdict higher than was ultimately awarded. Initially, the jury rendered a verdict that awarded the plaintiff "$4,659.00 + Eng Fees, Lawyer fees, fix Cap & bumper." 185 W. Va. at 297, 406 S.E.2d at 728. Added together, the initial jury verdict would have awarded the plaintiff around $18,000. *Id.* at 300, 406 S.E.2d at 731. However, the trial court in *Bostic* rejected the verdict because it did not provide a sum certain and directed the jury to provide a definitive sum. *Id.* When calculating the amount of damages, the jury returned a second verdict awarding the plaintiff only $15,000. *Id.* After the trial court denied additur, this Court reversed and determined that additur was appropriate because the jury, in its first verdict, *intended* to award more damages but the award was mistakenly reduced in the second verdict due to the jury's failure to understand the cost of an expert witness's fee. *Id.*

Here, there is no evidence that the jury made an error in its award of damages, or that the jury attempted to award any more damages than what was returned in the verdict. In her post-trial

motion, Respondent argued that the jury's award was too low because Speedway did not cross-examine Respondent's expert, Mr. Selby, on his opinion of lost wages, and because the jury asked a question during deliberations. That Speedway did not cross-examine Respondent's expert on his calculation of lost wages is not pertinent, and the jury question did not indicate that the jury intended a higher award.

Whether or not the damages calculation opinions of Mr. Selby were uncontroverted is irrelevant as juries are not bound to accept as conclusive the testimony of any witness. Instead, "[o]nce a witness, including an expert witness, is permitted to testify, it is within the province of the jury to evaluate the testimony[,]" and "[t]he jury may then assign the testimony such weight and value as the jury may determine." *Tabor v. Lobo*, 186 W. Va. 366, 368–69, 412 S.E.2d 767, 769–70 (1991). This means that "a jury is not bound to accept as conclusive the testimony even of an unimpeached witness." *Id.* Experts "base[] their calculation of damages on certain assumptions," and "[t]he jury [i]s not bound to accept the assumptions upon which these computations [are] based." *Bressler*, 194 W. Va. at 621–22, 461 S.E.2d at 127–28.

Respondent argued in her post-trial motion that the jury's award was too low because "[t]he past lost wages were not contested in any manner and essentially came into evidence as a stipulated amount." (JA 3301.) This is clearly inaccurate as Speedway did not stipulate to the amount of Mr. Jarrett's past lost wages. Respondent incorrectly argued such damages were "stipulated" because "[c]ounsel for Speedway, did not question the amount of past lost wages when cross-examining Mr. Selby." (*Id.*) Again, this is irrelevant. Even if Speedway did not cross-examine Mr. Selby on his damage calculation opinions, the jury was not required to accept Mr. Selby's calculations as true. Therefore, that Speedway's counsel did not cross-examine Mr. Selby regarding his calculations of lost wages is irrelevant.

Likewise, the jury's question seeking the tangible printout of Mr. Selby's calculations, which Respondent chose not to enter into evidence,[5] is insufficient to demonstrate that the jury intended to award further damages. During deliberations, the jury sent a question to the Circuit Court, "Requesting Mr. Selby's projective earnings and lost wages. (found W2s but can't find these)." (JA 3256.) In her post-trial motion, Respondent argued that "[b]ecause the Court could not provide the jury with the figures but advised them to rely on their collective memory, the incorrect figure was entered onto the verdict form." (JA 3300.) Although the jury's question relates to the damages of the case, it does not indicate, as required by *Bostic*, that the jury intended to award Respondent more damages. Viewed in the light most favorable to Speedway, the jury's question merely indicated interest regarding the printout of the expert's calculations. However, this does not demonstrate that the jury actually made an error in its award of damages or that the jury intended to award more. As established above, the jury was free to accept or disregard Mr. Selby's testimony as it saw fit, and there is no indication of what verdict would have been returned if the jury had a copy of those calculations. Moreover, "the jury's award of [damages] is not inadequate as a matter of law solely because it does not conform exactly with the damage testimony of the . . . expert witness on the issue." *Bressler*, 194 W. Va. at 622, 461 S.E.2d at 128. Therefore, "[t]his case simply does not fall within the parameters of limited scenario in which this Court has approved the use of additur." *Id.* at 621, 461 S.E.2d at 127.

C. The Circuit Court erred in granting Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages because the damages awarded by the jury were not manifestly inadequate.

The Circuit Court erred in granting Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages because the damages awarded by the jury were not manifestly inadequate

[5] By granting additur in this situation, the trial court corrected Respondent's counsel's tactical mistake in not providing the jury with an exhibit summarizing the lost wage claim.

under West Virginia law, as the jury provided a damages award for all forms of damages established at trial and awarded an amount it believed appropriate.

1. Standard of review.

Although "[t]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, . . . the trial court's ruling will be reversed on appeal . . . when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 2, *Grimmett v. Smith*, 238 W. Va. 54, 792 S.E.2d 65, 65–67 (2016). "[W]hen a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that had no appreciable effect on the outcome, it is this Court's duty to reverse." *Id.* at 60, 792 S.E.2d at 71.

2. The damages awarded by the jury were not manifestly inadequate under West Virginia law.

"[I]n the absence of any specific rule for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict." *Kessel v. Leavitt*, 204 W. Va. 95, 185, 511 S.E.2d 720, 810 (1998). Further, courts "will not find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy." Syl. Pt. 2, *Fullmer v. Swift Energy Co., Inc.*, 185 W.Va. 45, 404 S.E.2d 534 (1991). A manifestly inadequate verdict is one which entirely disregards established damages. *See Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993).

At trial in *Linville v. Moss*, the plaintiff established damages totaling $3,719 for funeral expenses and $240,180 for household services following the death of her husband. *Id.* at 573, 433 S.E.2d at 284. The jury returned a verdict of $4,000 for funeral expenses. *Id.* However, despite being argued and established at trial, "[t]he jury awarded *nothing* to decedent's wife or son for loss of services, sorrow, mental anguish, or companionship." *Id.* (emphasis added). Because the jury

awarded nothing for those categories of damages, this Court concluded that the jury's award of only the funeral expenses "must have been based upon some misinterpretation of the law of damages." *Id.* at 575, 433 S.E.2d at 286. Here, unlike in *Linville*, the jury's verdict included an award for all categories of damages asked for; there were no categories of damages that the jury failed to award. (*See* JA 3288–89.) Specifically, the jury returned a verdict for significant sums on these elements of damages – $80,000 for sorrow and mental anguish and $100,000 for lost household services. Therefore, the jury's damage award was not manifestly inadequate, and the Circuit Court should not have granted a new trial on the issue of unliquidated damages.

That the award of damages at issue was for non-economic damages renders the Circuit Court's decision even more flawed. "An award for mental anguish is necessarily based upon a subjective evaluation by the jury . . . Such awards must remain within the discretion of the jury, and their review upon appeal must be limited to the narrow question of whether the verdict was clearly inadequate." *Hewett v. Frye*, 184 W. Va. 477, 480, 401 S.E.2d 222, 225 (1990). Crucially, "[a] mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant granting of a new trial on the ground of inadequacy unless the verdict is so small that it clearly indicates the jury was influenced by improper motives." *Moore v. St. Joseph's Hosp. of Buckhannon, Inc.*, 208 W. Va. 123, 127–28, 538 S.E.2d 714, 718–19 (2000).

Respondent did not even suggest, nor could she, that the jury was influenced by an improper motive in its award of mental solace damages. Instead, she simply asserted that the damages were lower than she believes were appropriate. However, a disagreement with the amount of the verdict is not enough to warrant the grant of a new trial on damages. *See id.* at 127–28, 538 S.E.2d at 718–19; *Sargent v. Malcomb*, 150 W. Va. 393, 396, 146 S.E.2d 561, 564 (1966). Here, when the evidence is viewed in the light most favorable to Speedway, the jury provided a

significant damages award for all forms of damages established at trial. The jury's unanimous decision was rendered after being fully instructed as to West Virginia law, after hearing all of the evidence, and after watching the witnesses testify, and should not be supplanted by the Circuit Court's opinion as to the damages that should have been awarded.

Respondent's motion for a new trial on the loss of household services should have been denied for the same reasons. In a nutshell, Respondent argued that the jury's award was too low because Speedway did not adequately contest the amount of damages for the loss of Mr. Jarrett's household services. (*See* JA 3307–08.) As an initial point, Speedway cross-examined Respondent's expert, Mr. Selby, on his calculation of household services damages and the factual basis for those calculations, so Respondent's argument that Speedway did not adequately contest these damages is without merit.

Moreover, as established above, the jury is entitled to give whatever weight it chooses to expert witness testimony, and a jury is not required to accept the testimony of any witness, even if that witness is unimpeached. *Tabor*, 186 W. Va. at 368–69, 412 S.E.2d at 769–70. Further, this Court has generally only held jury awards "manifestly inadequate" in situations where juries do not provide an award for all categories of damages established at trial. *See Linville*, 189 W. Va. at 575, 433 S.E.2d at 286; *Martin v. Charleston Area Med. Ctr.*, 181 W. Va. 308, 311, 382 S.E.2d 502, 505 (1989). For these reasons, the jury's award of $80,000 for sorrow and mental anguish and $100,000 for lost household services was not manifestly inadequate. Accordingly, the Circuit Court erred in granting Respondent's Rule 59 Motion for a New Trial on Unliquidated Damages.

III. The Circuit Court erred in in denying Speedway's Alternative Motion for a New Trial on all issues under Rule 59 due to the presence of multiple prejudicial errors at both trials.

A. Standard of review.

Where a "verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial." Syl. Pt. 3, in part, *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994). A party is entitled to a new trial "if there is a reasonable probability that the jury's verdict was affected or influenced by trial error." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 111, 459 S.E.2d 374, 388 (1995). Granting a new trial is particularly appropriate in cases of cumulative errors. Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379 ("The cumulative error doctrine may be applied . . . when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable.").

B. Speedway is entitled to a new trial on all issues due to the presence of multiple prejudicial errors at both trials.

1. The Circuit Court erroneously overruled Speedway's objections to Mr. Selby's testimony regarding the value of lost household services.

During Respondent's case-in-chief, Daniel Selby offered testimony regarding the value of the loss of household services as a result of Mr. Jarrett's death. However, "a plaintiff's mere loss of the ability to do housework is a customary activity and is not subject to economic calculation." *Doe v. Pak*, 237 W. Va. 1, 7 n.8, 784 S.E.2d 328, 334 n.8 (2016). This is because "[t]he loss of customary activities constitutes the loss of enjoyment of life." *Flannery v. U.S.*, 171 W. Va. 27, 30, 297 S.E.2d 433, 436 (1982). And "[t]he loss of enjoyment of life resulting from personal injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation." Syl. Pt. 4, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993). Under West Virginia law, the loss of these services is not subject to economic calculation, however, because they are general damages. Therefore, Mr. Selby's testimony on the value of lost household services was inappropriate and should have been excluded from both trials.

2. The Circuit Court erroneously overruled Speedway's objection to the admission of Speedway's internal guidelines and policies.

Over Speedway's objection, Respondent also introduced Speedway's internal guidelines, policies, and procedures regarding alcohol and drug use, drug testing, and employee searches. (*See, e.g.*, JA 2312–2316.) Such evidence is inadmissible under the West Virginia Rules of Evidence because it is irrelevant and misleading to the jury. Under the Rules of Evidence, relevant evidence "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." W. Va. R. Evid. 401.

At trial, Respondent introduced into evidence Speedway's internal policies regarding drug testing and searching of employees' personal belongings, over Speedway's overruled objections. (JA 2312–2316.) Such evidence was irrelevant, highly prejudicial to Speedway, and misleading for the jury. Speedway's policies, and their adequacy, were not at issue in this case. Rather, this case is about whether Speedway engaged in affirmative conduct giving rise to a legal duty, and if so, whether that duty was breached. Speedway's internal guidelines do not make it more or less probable that Speedway engaged in conduct giving rise to a legal duty. In other words, Speedway's guidelines are irrelevant because "the central issues in this case concern whether Defendant complied with . . . applicable State . . . law, not whether it complied with its own guidelines." *Zubaidi v. Countrywide Home Loans Servicing, LP,* 2010 WL 11562077 at *2 (S.D. W. Va. Sept. 23, 2010).

Moreover, Speedway's internal guidelines are irrelevant because liability in this case must be based on some violation of the law, not a violation of an internal guideline. Courts have consistently ruled that violations of internal policies alone cannot establish liability and do not impose heightened duties of care. *See Cavcon,* 557 F.Supp.2d at 724; *see also Walsh v. Berkebile,* 2010 WL 6784764 (S.D. W. Va. Feb. 19, 2010). Thus, Speedway's policies are irrelevant because they do not set the standard for Speedway's conduct.

Respondent's introduction and use of Speedway's drug testing policy[6] to suggest that Speedway was at fault because it did not drug test Ms. Liggett was most prejudicial and problematic under West Virginia law. First, in 2015 when this incident occurred, a West Virginia employer could not routinely drug test employees, as such was violative of the employee's right of privacy. *See Twigg v. Hercules Corporation,* 185 W.Va. 155, 406 S.E.2d 520 (1990).[7] Furthermore, West Virginia law has never required employers to drug test their employees. Pre-hiring drug testing is the same; while drug testing in the pre-hiring process is allowed, it is never legally required. *See Baughman v. Wal-Mart Stores, Inc.,* 215 W.Va. 45, 592 S.E.2d 824 (2013).

Despite the law governing drug testing in West Virginia, the Circuit Court permitted Respondent to introduce evidence of Speedway's drug testing policies to somehow prove Speedway's negligence on the date in question because Ms. Liggett was not drug tested. It also improperly used Speedway's policy in its denial of Speedway's 50(b) motion, heatedly calling the policy as "hollow as a Halloween pumpkin" because Speedway does not routinely drug test employees. (*See* JA 2964–70.) Not only was the admission of the drug testing policy wholly irrelevant, highly prejudicial, and misleading for the jury, Respondent offered no basis to conclude that if Speedway had drug tested Ms. Liggett at the time she was hired or during one of her three days of employment, it would have somehow have affected the outcome of the events of September 15, 2015. The Circuit Court's allowance of Speedway's policies—especially its drug testing policy—over Speedway's objection was in error.

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[6] Speedway's policy simply authorizes the company to drug test its employees under certain circumstances, limited to "reasonable suspicion, random (for safety-sensitive positions only), post-rehabilitation, and aviation department." (JA 2313.)

[7] The West Virginia Safer Workplace Act was enacted in July 2017, almost two years after Ms. Liggett was hired and the accident at issue occurred.

3. The Circuit Court erroneously overruled Speedway's objections to the admission of Ms. Maguire's note in Ms. Liggett's personnel file.

At trial, Respondent introduced a page from Brandy Liggett's personnel file that contained a note handwritten by Bobbi Jo Maguire (the "Note"). The Note in Ms. Liggett's personnel file reads "On something or for some reason kept falling asleep while here including emptying outside trash and while standing watching [training videos]. Auto accident killed a guy." (JA 2374.) This Note is inadmissible under the West Virginia Rules of Evidence because it is not relevant and its probative value, if any, is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury. W. Va. R. Evid. 402; W. Va. R. Evid. 403.

The Note is irrelevant because it has no tendency to make any fact more or less probable than it would be without it. This lawsuit is about Speedway's conduct *during* Ms. Liggett's shift on the day of the accident. As such, Respondent introduced the Note, over Speedway's overruled objection, in an effort to mislead the jury and suggest that Ms. Maguire knew Ms. Liggett was "on something" on the date of incident. However, Ms. Maguire testified at trial that, on the date of the incident and at all times before the accident, she was unaware that Ms. Liggett took prescription medications. (JA 2627.) Ms. Maguire testified that she became aware of the medications in Ms. Liggett's system during her discussion with the prosecutor during a criminal investigation into Ms. Liggett's actions, which occurred months afterward. (JA 2634–35.)[8] Information that Ms. Maguire learned and recorded months after the accident and put in Ms. Liggett's personnel file well after she was terminated (responsibly, so that she would not be rehired) had no impact on Ms. Maguire's conduct on the day of the accident. Therefore, the Note is irrelevant and its use to allegedly prove that Ms. Maguire had knowledge of Ms. Liggett's impairment on the date of the incident was improper and misleading.

[8] The Circuit Court even recognized prior to trial that Ms. Maguire made the Note "*following* notice that [Ms. Liggett] had killed Mr. Jarrett." (JA 1532, ¶ 31) (emphasis added).

4. The Circuit Court erroneously excluded the trial testimony of Speedway's corporate representative.

During the first trial, Respondent's counsel argued that Speedway's corporate representative, Anthony Carf—who Speedway intended to call during its case-in-chief—could not testify during Speedway's case in chief because Respondent had designated portions of Mr. Carf's deposition, and Speedway had counter-designated portions in response. Citing its prior rulings that Mr. Carf would not be allowed to offer opinion testimony and that his testimony would be "restricted to the testimony contained within his deposition," the Circuit Court ruled that Mr. Carf was precluded from testifying at trial *at all*, despite Speedway's counsel's assurance that Mr. Carf's testimony would not be expert in nature and would, instead, relate to certain specific issues not read into the record by way of the deposition transcript. (JA 3034-37.) This ruling is unsupported by West Virginia law.

There is no Rule of Procedure, no Rule of Evidence, and no case law that suggests that Speedway's counter-designation portions of Mr. Carf's deposition precluded Speedway from being able to call Mr. Carf at trial.[9] Therefore, Mr. Carf should have been allowed to testify as Speedway's corporate representative at trial, and his testimony would have involved topics not specifically covered during his deposition but relating to such matters. (*See* JA3035-37.)

5. The Circuit Court erroneously prohibited reference to the first jury trial and types of wrongful death damages and refused to give Speedway's Jury Instruction No. 2 regarding the same.

During the second pretrial conference, the Circuit Court prohibited counsel from making any reference to the first jury trial in this case, the results of that trial, or the existence of other categories of wrongful damages beyond "solace damages" and lost household services. (*See* JA 3785–86.) The Circuit Court likewise declined to give Speedway's Jury Instruction No. 2, as

[9] The Circuit Court's ruling at trial was also inconsistent with its prior Order, which permitted Speedway to offer testimony by Mr. Carf regarding matters "contained within [his] deposition[]" and those "relating to or arising from [the] matters" contained within his deposition testimony. (JA 320-21.)

proposed, which would have instructed the jury that in a prior trial, a jury had determined that both Ms. Liggett and Speedway are legally responsible for the accident and that, as a result of that trial, Mr. Jarrett's beneficiaries had been awarded certain categories of damages available in a wrongful death action. (*See* JA 3688–89.) Instead, the Circuit Court only instructed the jury that a wrongful death suit had been filed against Speedway and Ms. Liggett, and that the jury was to assess "solace damages" and household services to compensate Mr. Jarrett's beneficiaries. (*See* JA 3857–58.) By failing to provide pertinent information to the jury regarding the result of the first trial, the Circuit Court's instruction was misleading and had the reasonable potential to mislead the jury as to the correct legal and factual framework to guide its decision.

6. The Circuit Court erroneously overruled Speedway's objections to Respondent's counsel's improper closing arguments.

This Court has warned that trial courts "should cautiously examine the use during closing arguments of exhibits which have not been admitted into evidence." *State v. Ashcraft*, 172 W. Va. 640, 651, 309 S.E.2d 600, 611–12 (1983). Despite this directive, the Circuit Court permitted Respondent's counsel to display a highly prejudicial and misleading demonstrative aid to the jury and argue to the jury based on the document.

W. Va. Code § 55-7-6(c)(1) specifically delineates categories of damages available in a wrongful death action, including the two categories that were to be assessed by the jury in this case, that is, damages for "(A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent" and "(B) compensation for reasonably expected loss . . . (ii) services, protection, care and assistance provided by the decedent." W. Va. Code § 55-7-6. Respondent's demonstrative exhibit broke up these two categories into fifty-two (52) separate lines and boxes that Respondent's counsel argued should be filled in and "added up" to determine the damages to be awarded to Mr. Jarrett's

beneficiaries. (JA 4027.) Over Speedway's objection, the Circuit Court allowed Respondent's counsel to tell the jury, "You have to fill in a number for every one of those. There's fifty-two of them, fifty-two." (JA 4026.) Respondent's improper demonstrative exhibit and counsel's argument to the jury were misleading and confusing as to damages to be awarded, and there is a reasonable probability that the jury's verdict was influenced by the improprieties.

Finally, Respondent's counsel's suggestion of a verdict amount to the jury constituted error. In *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986), a wrongful death case, plaintiff's counsel improperly suggested a verdict amount to the jury during closing arguments. Specifically, "[c]ounsel argued that if a $10,000,000 racehorse had been killed through the negligence of a veterinary hospital, the measure of damages would be exactly $10,000,000." *Id.* at 499, 345 S.E.2d at 799. The jury returned a verdict for the plaintiff in the amount of $10,000,000, and on appeal this Court recognized that implying that the jurors had a duty to place a value on the decedent's life was inconsistent with West Virginia's wrongful death statute and suggesting a verdict amount to the jury was prejudicial. *Id.* at 499–500, 375 S.E.2d at 798–800.

Here, as in *Roberts*, Respondent's counsel's argument was inconsistent with the wrongful death statute when he told the jurors that it was their "obligation" to "put a specific dollar on a person's life; the value." (JA 4023.) And, as in *Roberts*, Respondent's counsel improperly suggested a verdict amount to the jury by repeatedly stating that some jurors "may feel that six million dollars is too much[.]" (JA 4027–28; JA 4038.) West Virginia law holds that suggesting a verdict amount to a jury for noneconomic damages will "result in reversible error where the verdict is obviously influenced by such statement." *See* Syl. Pt. 7, in part, *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989). Here, the twice repeated statement of Respondent's

counsel that "[s]ome of you may feel that six million dollars is too much" obviously influenced the jury to return a verdict in the total amount of $5,862,323.00.

IV. The Circuit Court erred in denying Speedway's Alternate Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order because the Order incorrectly assessed post-judgment interest.

A. Standard of review.

"A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 50, 717 S.E.2d 235, 237 (2011) (while Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts have set forth the grounds for amending earlier judgments). Applying the *Mey* factors to the instant case, the Circuit Court erred by refusing to amend its Final Judgment Order to remedy a clear error of law pertaining to its award of post-judgment interest and to prevent obvious injustice to Speedway based on the same.

B. The Final Judgment Order erroneously assesses post-judgment interest beginning on the wrong date and fails to account for the prior judgment order entered subsequent to the first trial in this case.

Speedway timely moved the Circuit Court to alter or amend Paragraph 4 of its August 5, 2020 Final Judgment Order, which found that Respondent is entitled to judgment for the following:

> 4. Post-judgment interest as allowed by law at the rate of 5.5% (the 2019 rate) from July 26, 2019, on the award of damages from the July 26, 2019 jury verdict as reformed by the Court in its Order of November 18, 2019, and after application of W. Va. Code § 55-7-13c, and inclusive of pre-judgment interest, said amount being $285,097.74[.]

(JA 4052, ¶ 4) (emphasis added). There are multiple problems with this provision of the Order.

First, the Final Judgment Order assesses post-judgment interest beginning on July 26, 2019, the date the first jury returned its verdict, rather than the date the judgment order was entered,

which is contrary to West Virginia law. *See* W. Va. Code § 56-6-31(a) ("[E]very judgment or decree for the payment of money . . . *entered* by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not.") (emphasis added). The date that post-judgment interest commences is the date that the judgment order is actually entered, and the Circuit Court's decision to the contrary was error.

Second, the Final Judgment Order assesses post-judgment interest beginning on July 26, 2019, on the total damages awarded against Speedway, being $244,335.41 in damages plus pre-judgment interest of $40,762.33, for a total of $285,097.74. This calculation assesses post-judgment interest beginning on July 26, 2019, on an element of damages (past wage loss) that was not even *assessed* against Speedway until November 18, 2019. (*See* JA 3486–87.)

Third, the Final Judgment Order assesses post-judgment interest beginning on July 26, 2019, the date of the first supposedly final judgment order despite the fact that the prior judgment orders were argued by Respondent's counsel not to be "final." In fact, Respondent's counsel successfully sought to dismiss Speedway's first appeal on that very basis, alleging that Speedway incorrectly represented to this Court that a final order had been entered in the case. (*See* JA 3521–27.)[10] Following the dismissal of the appeal, however, Respondent reversed course and argued that the Circuit Court should award post-judgment interest on an award pursuant to a non-final order.

For these reasons, this Court should reverse the Circuit Court's erroneous denial of Speedway's Motion to Alter or Amend the August 5, 2020 Final Judgment Order and remand with

[10] In that filing, Respondent repeatedly made such statements as "the order did not represent a final decision"; "the true character of the lower court's order . . . was not a final order..."; and "there has not been a final order" . . . [.] (*See id.*) Indeed, one of the argument headings in Respondent's Motion to Dismiss was, "THE LOWER COURT'S ORDER IS NOT FINAL." (*Id.*) Throughout that section of Respondent's motion, she repeatedly urged that the Circuit Court's previously entered "final judgment order," was not, in fact, a final judgment under W. Va. Code § 58-5-1.

instructions to correct the award of post-judgment interest, including by replacing Paragraph 4 of the Order with the following language:

> 4. Post judgment interest is allowed by law at the rate of 4.75% (the 2020 rate) from the date of the entry of this Order on the award of damages as reflected in the jury's verdict, after application of W. Va. Code § 55-7-13c.

CONCLUSION

This case has become a watershed case for employer liability in West Virginia. Over the course of five years and two trials, the Circuit Court has single-handedly attempted to change West Virginia law by consistently ruling directly contrary to this Court's longstanding precedent in *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983), and *Overbaugh v. McCutcheon*, 183 W. Va. 386, 396 S.E.2d 153 (1990). As such, Speedway asks this Court to follow its precedent and reverse the Circuit Court's denial of Speedway's Rule 50(a) Motions for Judgment as a Matter of Law at trial and Rule 50(b) Motions for Judgment as a Matter of Law after trial, with instructions to enter judgment in Speedway's favor. Alternatively, the Court should reverse the Circuit Court's erroneous decisions granting Respondent's Rule 60(b) Motion to Alter or Amend the Verdict by Way of Additur and Rule 59 Motion for a New Trial on Unliquidated Damages, denying Speedway's alternate Rule 59 Motion for a New Trial on all issues, and denying Speedway's alternate Rule 59(e) Motion to Alter or Amend the Court's August 5, 2020 Final Judgment Order.

Respectfully submitted,

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Counsel for Petitioner Speedway LLC

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF CABELL, to wit:

I, Robert L. Massie, counsel for Speedway LLC, being duly sworn, state that I have read the foregoing *Brief of Petitioner Speedway LLC*; that the factual representations contained therein are true, except so far as they are stated to be upon information and belief, I believe them to be true.

Taken, subscribed and sworn to before me, the undersigned Notary Public, this 28th day of June, 2021.

My commission expires May 30, 2024.

NOTARY PUBLIC

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Christianne L. Hobson
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My Commission Expires May 30, 2024

No. 21-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPEEDWAY LLC,

Defendant Below, Petitioner

vs.

DEBORAH L. JARRETT, as the Executrix of the Estate of Kevin M. Jarrett,

Plaintiff Below, Respondent.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 15-C-217

CERTIFICATE OF SERVICE

I, Robert L. Massie, hereby certify that true and correct copies of the foregoing ***Brief of the Petitioner Speedway LLC*** and ***Appendix*** were served upon the following via electronic mail[1] on this 28th day of June, 2021:

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[1] Pursuant to an agreement by counsel and due to the volume of Appendix record, copies of this filing are being served upon counsel of record electronically through secure file transfer link.

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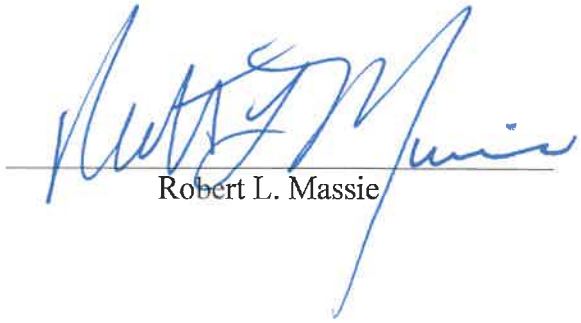

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